

**DRAFT - REVIEW OF SECTION 401 WATER QUALITY CERTIFICATION  
APPLICATIONS - LANGUAGE TO BE INSERTED IN THE REVIEW PROCEDURES  
DRAFT - SEE RULE 2, 327 IAC 17-2-1, PAGE 6**

**I      Assessment of wetland uses**

All uses set forth at 327 IAC 2-1.8-4 are presumed to exist in all wetlands which meet the definition of wetlands as described in this rule and the criteria set forth by the U.S. Army Corps of Engineers.

**II     Assessment of impacts on water quality**

A      The department shall review all applications for Section 401 Water Quality Certification to determine if the proposed activity is water dependent.

B      For water dependent projects which involve impacts to Tier 1 wetlands and other waters of the state, the following provisions apply;

- 1      The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential impacts on the aquatic ecosystem. The department's review shall include:
  - a      the spatial requirements of the project;
  - b      the location of existing structural or natural features that may dictate the placement or configuration of the project;
  - c      the purpose of the project and how the purpose relates to placement, configuration, or density;
  - d      the spatial distribution of wetlands and other waters on the site;
  - e      individual, secondary, and cumulative impacts; and
  - f      an applicant's efforts to:
    - i      modify the size, scope, configuration, or density of the project;
    - ii     remove or accommodate site constraints including zoning, infrastructure, access, or natural features; and
    - iii    otherwise minimize impacts.
- 2      If the department finds that an applicant has not complied with the requirements to minimize wetland impacts, the department shall deny water quality certification for the proposed project.
- 3      For wetlands impacts 0.1 acres or less in size the department may require appropriate compensatory mitigation. Compensatory wetland mitigation will be required if the remaining impact exceeds 0.1 acre of wetlands. Compensatory wetland mitigation must replace all adversely impacted uses

in accordance with the provisions set forth in 327 IAC XXX. When considering mitigation the department shall consider if the project will have a significant impact on water quality. The department shall consider factors including:

- a If the project involves the maintenance, repair or rehabilitation of existing man-made structures, excluding drainage ditches.
- b The secondary and cumulative impacts of the project.
- c The proximity of the proposed impact to other waterbodies.
- d The duration of the impact.
- e The plant species diversity and fish and wildlife habitat components of the wetland to be impacted.

- 4 For all other waters of the state, the department may require appropriate compensatory mitigation for all remaining impacts. Compensatory mitigation must replace all adversely impacted uses in accordance with the provisions set forth in 327 IAC XXX. When considering mitigation requirements the department shall consider if the project will have a significant impact on water quality. The department shall consider factors including:

- a If the project involves the maintenance, repair or rehabilitation of existing man-made structures, excluding drainage ditches.
- b The secondary and cumulative impacts of the project.
- c The proximity of the proposed impact to other waterbodies.
- d The duration of the impact.
- e If the project involves the relocation, realignment or channelization of an existing stream.
- f If the project would reduce or control an environmental problem or a threat to the environment.

- C For non-water dependent projects which involve impacts to Tier I wetlands and other waters of the state, the following provisions apply:

- 1 The department shall not grant certification if there is a practicable alternative to the proposed discharge that would have less impact on the aquatic ecosystem. Practicable alternatives are presumed to exist unless the applicant demonstrates otherwise. Compensatory mitigation is not considered an alternative for the purposes of this section. In evaluating alternatives the department shall consider the following -
  - a The applicant shall provide the department with documentation describing at least three alternatives in addition to the proposed project, one of which shall be the no-build alternative, that would avoid impacts to wetlands, except that for repair or rehabilitation projects on existing infrastructure only one alternative is required.

The alternatives may include consideration of alternate sites or alternative project configurations on the proposed site. The alternatives must be judged by the department as good faith efforts, or the department may require the applicant to redraft them for reconsideration.

- b The department shall consider the following in evaluating practical alternatives as applicable:
    - i whether the basic project purpose can be reasonably accomplished using one or more other sites in the same general area that would avoid wetland impacts. An alternate site may not be excluded from consideration only because it includes or requires an area not owned by the applicant that could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project;
    - ii the general suitability of alternate sites considered by the applicant;
    - iii whether reasonable modification of the size, scope configuration, or density of the project would avoid impacts to wetlands;
    - iv efforts by the applicant to accommodate or remove constraints on alternatives imposed by zoning standards or infrastructure, including requests for conditional use permits, variances, or planned unit developments.
- 2 Avoidance shall be required when the proposed project would impact an Outstanding State or National Resource Water, or other specially designated high quality water unless the impact is short term or temporary. In no case shall the impact and its effects be allowed for a period of time greater than one year from the date the project begins.
- 3 The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential impacts on the aquatic ecosystem. The department's review shall include:
- a the spatial requirements of the project;
  - b the location of existing structural or natural features that may dictate the placement or configuration of the project;
  - c the purpose of the project and how the purpose relates to placement, configuration, or density;
  - d the spatial distribution of wetlands and other waters on the site;
  - e individual, secondary, and cumulative impacts; and
  - f an applicant's efforts to:
    - i modify the size, scope, configuration, or density of the project;
    - ii remove or accommodate site constraints including zoning,

- iii infrastructure, access, or natural features; and  
otherwise minimize impacts.

- 4 If the department finds that an applicant has not complied with the requirements to avoid and minimize wetland impacts, the department shall deny water quality certification for the proposed project.
- 5 For wetlands impacts 0.1 acres or less in size the department may require appropriate compensatory mitigation. Compensatory mitigation will be required if the remaining impact exceeds 0.1 acre of wetlands. Compensatory mitigation must replace all adversely impacted uses in accordance with the provisions set forth in 327 IAC XXX. When considering mitigation requirements the department shall consider if the project will have a significant impact on water quality. The department shall consider factors including:
  - a If the project involves the maintenance, repair or rehabilitation of existing man-made structures, excluding drainage ditches.
  - b The secondary and cumulative impacts of the project.
  - c The proximity of the proposed impact to other waterbodies.
  - d The duration of the impact.
  - e The plant species diversity of the wetland to be impacted.
- 6 For all other waters of the state, the department may require appropriate compensatory mitigation for all remaining impacts. Compensatory mitigation must replace all adversely impacted uses in accordance with the provisions set forth in 327 IAC XXX. When considering mitigation the department shall consider if the project will have a significant impact on water quality. The department shall consider factors including:
  - a If the project involves the maintenance, repair or rehabilitation of existing man-made structures, excluding drainage ditches.
  - b The secondary and cumulative impacts of the project.
  - c The proximity of the proposed impact to other waterbodies.
  - d The duration of the impact.
  - e If the project involves the relocation, realignment or channelization of an existing stream.
  - f If the project would reduce or control an environmental problem or a threat to the environment.

D For all projects which involve Tier II waters or impacts to specially designated waterbodies, the following provisions apply;

- 1 The applicant shall submit an antidegradation demonstration in accordance with 327 IAC 2-1.8-2. The department shall provide an opportunity for public comment and inter-governmental coordination regarding the proposed project.

- 2 The applicant shall prepare an antidegradation demonstration at least 60 days before submittal of an application for a Section 404 permit from the U.S. Army Corps of Engineers and a Section 401 Water Quality Certification from the Department of Environmental Management. This evaluation shall include:
- a An evaluation of the baseline economic condition, including:
    - i The unemployment rate in the county
    - ii The population of the county
    - iii The average household income relative to state and national averages
    - iv The percent of the population living below the poverty level.
  - b Information on the anticipated net positive impacts attributable to the proposed activity in the county in which the project will be located, including:
    - i The increase in employment, or avoidance of a reduction in employment.
    - ii The reduction in the local unemployment rate attributable to the proposed project.
    - iii The total annual new payroll of resident nonofficers for the new or increased employment, and the average wages for the new, nonofficer employees. In lieu of this information, the applicant may provide other information that quantifies the extent of the economic benefit to be provided to the area.
    - iv The increased net tax revenues
    - v The increase in production level, if applicable
    - vi The increase in efficiency, if applicable
    - vii The extent to which an environmental or public health problem is corrected.
  - c An identification of the potential adverse environmental or public health impacts attributable to the proposed project, including:
    - i An identification of the potential impact on the aquatic community.
    - ii An identification of endangered or threatened species potentially impacted by the proposed project.
    - iii An identification of characteristics of the waterbody proposed to be impacted that are unique or rare within the locality or state potentially impacted by the proposed project.
    - iv The location of the nearest potentially affected public water

- supply intake, if any.
  - v An identification of all government or privately sponsored projects that have specifically targeted improved water quality or enhanced recreational opportunities within the 14 digit watershed containing the waterbody proposed to be impacted.
  - vi The potential impact on groundwater recharge.
  - vii The potential impact on recreation, aesthetics and scientific research.
  - viii The potential impact on shoreline or streambank erosion protection.
  - ix The potential impact on natural regional stormwater detention or retention.
- d The applicant shall demonstrate that all alternatives to the proposed project have been considered. Practicable alternatives are presumed to exist unless the applicant demonstrates otherwise. Compensatory mitigation is not considered an alternative for the purposes of this section. In evaluating alternatives the department shall consider the following -
- i The applicant shall provide the department with documentation describing at least three alternatives in addition to the proposed project, one of which shall be the no-build alternative, that would avoid impacts to wetlands, except that for repair or rehabilitation projects on existing infrastructure only one alternative is required. The alternatives may include consideration of alternate sites or alternative project configurations on the proposed site. The alternatives must be judged by the department as good faith efforts, or the department may require the applicant to redraft them for reconsideration.
  - ii The department shall consider the following in evaluating practical alternatives as applicable:
    - 1 whether the basic project purpose can be reasonably accomplished using one or more other sites in the same general area that would avoid wetland impacts. An alternate site may not be excluded from consideration only because it includes or requires an area not owned by the applicant that could reasonably be obtained, used, expanded, or managed to fulfill the basic purpose of the proposed project;
    - 2 the general suitability of alternate sites considered by the applicant;

- 3 whether reasonable modification of the size, scope configuration, or density of the project would avoid impacts to wetlands;
  - 4 efforts by the applicant to accommodate or remove constraints on alternatives imposed by zoning standards or infrastructure, including requests for conditional use permits, variances, or planned unit developments.
- e The applicant shall demonstrate that all reasonable and appropriate steps have been taken to minimize potential impacts on the aquatic ecosystem. The department's review shall include:
- i the spatial requirements of the project;
  - ii the location of existing structural or natural features that may dictate the placement or configuration of the project;
  - iii the purpose of the project and how the purpose relates to placement, configuration, or density;
  - iv the spatial distribution of wetlands and other waters on the site;
  - v individual, secondary, and cumulative impacts; and
  - vi an applicant's efforts to:
    - 1 modify the size, scope, configuration, or density of the project;
    - 2 remove or accommodate site constraints including zoning, infrastructure, access, or natural features; and
    - 3 otherwise minimize impacts.
- 3 If the department finds that an applicant has not complied with the requirements to avoid and minimize wetland impacts or if the project fails to demonstrate important socio-economic need, the department shall deny water quality certification for the proposed project.
  - 4 For wetlands, if the department approves in writing the antidegradation demonstration, the applicant must then provide up-front compensatory mitigation. Mitigation shall be performed at a 1:1 ratio and must be demonstrated to the department as being successful in replacing all adversely impacted wetland uses before work may proceed on any aspect of the project.
  - 5 For all other waters, compensatory mitigation must be performed for all impacts. Mitigation must, to the greatest extent, replace all adversely impacts uses of the water as well as the riparian corridor habitat, and other in-stream structure, such as pools and riffles.

- 6 Avoidance shall be required when the proposed project would impact an Outstanding State or National Resource Water, or other specially designated high quality water unless the impact is short term or temporary. In no case shall the impact and its effects be allowed for a period of time greater than one year from the date the project begins.
- E The department may deny certification if it determines that significant adverse impacts, including secondary and cumulative impacts, may result from the project.
- F The department may deny certification if the department determines that the proposed mitigation will not be able to successfully replace the impacted uses of the wetland.

### **III Emergency Issuance of Section 401 Water Quality Certifications**

- A. IDEM may issue an emergency water quality certification where IDEM determines that an unacceptable and immediate threat to human life, water quality, or aquatic resources may occur or when a severe loss of property may result before a certification can be issued in accordance with procedures specified in Section XXX of this rule.
- B. IDEM shall issue a notice stating its action and the reasons for the action in accordance with the requirements of Section XXX of this rule no later than 10 days following the issuance of the emergency certification.
- C. IDEM shall incorporate in the emergency certification all standards and criteria normally applied to the specific type of project authorized by the emergency certification.

### **IV Review of Corps of Engineers General Permits, including NWPS, LPs, PGPs**

- A. IDEM shall use the review procedures set forth in Section XXX of this rule when considering a decision to grant or deny certification for any new or proposed Corps of Engineers General Permit.
- B. IDEM shall utilize the public notice procedures set forth in section XXX of this rule when considering a decision to grant or deny water quality certification for a proposed Corps of Engineers general permit
- C. For all proposed General permits -
  - 1 In no case shall IDEM grant water quality certification for any general permit unless the certification carries conditions which prohibit the use of



- the general permit in any waters which have a tier II or greater designation.
- 2 IDEM may propose modifications or revisions which will be protective of water quality to any General permit.

## **V Procedures for Review of Projects Located within Interstate Waters**

- A. Upon receipt of such application IDEM shall immediately notify the USEPA Region V office of such application. IDEM shall also supply a copy of the public notice of the receipt of an application meeting these criteria to the administrator of the water pollution control agency in the state(s) affected by the project..
- B. If, within sixty days after receipt of such notification, such other State(s) determines that such discharge will affect the quality of its waters so as to violate any water quality requirement in such state(s), and within such sixty-day period notifies IDEM in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, IDEM shall hold such a hearing.
- C. After the public hearing and receipt of comments, IDEM shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements of both Indiana and the state(s) affected by such project. If the imposition of conditions cannot insure such compliance, IDEM shall not issue water quality certification for the proposed project.

## **VI Compliance**

- A. IDEM or any authorized representative may inspect any proposed project site, any site where a certification has been granted, denied, or waived, and any site where a potential violation of applicable water quality standards is known or is suspected. Upon demand, any such person shall present official credentials which clearly identify such person.
- B. Upon discovery of an act or action which violates any applicable state water quality standard, such person may issue a cease and desist order to any and all responsible parties. This order may be written or verbal, and in both cases must state the specific reasons for the stop work order and the applicable law or laws which have been violated. If a verbal order is issued, IDEM shall forward a written order to the responsible party within 3 working days of the observed violation.
- C. IDEM shall lift a cease and desist order when:
- 1 The responsible party has applied for and obtained all necessary

- authorizations from all agencies, or;
  - 2 The responsible party restores the site to its preconstruction conditions and IDEM concurs in writing, or;
  - 3 The responsible party proves to the satisfaction of IDEM that the activity does not violate any applicable law or regulation.
- D. In the event of an unauthorized activity, the applicant may chose to apply for an after the fact certification or IDEM may issue a unilateral restoration order. After the fact permits will be reviewed under Section XXX of this rule. If IDEM issues a restoration order, the order shall state, in writing, the actions the responsible party must take to remediate any and all adverse impacts to the environment, a timetable to complete these actions, and stipulation of further penalties for failure to comply with the order. This order shall not abridge IDEM's rights under IC 13-30 to seek additional penalties or corrective actions.

## **VII Expiration Date of Section 401 Water Quality Certification**

- A. All granted or waived section 401 water quality certifications shall be effective for two years from the date of issuance. If work has not commenced within wetlands or other waters by the end of two years, the applicant shall reapply to the department for section 401 water quality certification.
- B. All certifications granted for Corps of Engineers General Permits or Letters of Permission shall be effective for the duration of the Corps permit. In no case shall the certification be effective beyond five years from the date of effectiveness of the Corps permit.
- C. IDEM may rescind a water quality certification for a Corps of Engineers General Permit if the department determines the general permit is causing or contributing to adverse impacts to water quality.